Supreme Court, U.S.
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NO.

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1995

MICHAEL WEISSMAN and LINDA WEISSMAN;
RICHARD S. WEISSMAN and ROBIN WEISSMAN,

Petitioners,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

ON PETITION FOR CERTIORARI FROM THE
UNITED STATES COURT OF APPEALS
ELEVENTH CIRCUIT

BRIEF OF PETITIONERS ON JURISDICTION

CALVIN DAVID FOX, Esq.
4517 N.W. 31st Avenue
Fort Lauderdale, Florida 33309
(305) 730-0332
Attorney for Petitioners

84 pp

STATEMENT OF ISSUES MERITING CERTIORARI CONSIDERATION

1.) WHETHER THE TAX COURT DECISION RELIED UPON BY THE ELEVENTH CIRCUIT TO SUSTAIN THE TAX COURT DISMISSAL HEREIN FOR UNTIMELY FILING WITH THE TAX COURT, SHOULD BE OVERRULED, WHERE NO OPINIONS HAVE EVER CONSIDERED THE FOREGOING STATEMENT OF CONGRESSIONAL INTENT IN **U.S. CONGRESSIONAL AND ADMINISTRATIVE NEWS**, 4017, at 4583 (1954)?

2.) WHETHER CONGRESS INTENDED TO ALLOW PRIVATE MAILING TO BE TIMELY FILING WITH THE TAX COURT BY OTHER THAN UNITED STATES POSTAGE METERS, WHERE IN U.S. CONGRESSIONAL AND ADMINISTRATIVE NEWS, 4017, AT 4583 (1954), CONGRESS EXPRESSED ITS INTENT THAT ANY POSTMARK MACHINE **OR DEVICE** COULD BE USED UNDER 26 U.S.C. SECTION 7502(b) TO PROVIDE TIMELY FILING BY PRIVATE POSTMARK:

> "SINCE IT IS POSSIBLE TO PREDATE POSTMARKS WHERE MAILING MACHINES, **OR OTHER DEVICES** ARE USED, SUBSECTION (b) PROVIDES THAT A POSTMARK NOT MADE BY THE UNITED STATES POST OFFICE SHALL BE DEEMED THE DATE OF DELIVERY ONLY TO THE EXTENT PERMITTED BY REGULATIONS." [EMPHASIS ADDED].

3.) WHETHER THE FOLLOWING POSTMARK SAMPLE BY THE FEDEX MAILING MACHINE "DEVICE", USED BY THE APPELLEES FOR TIMELY FILING HEREIN IS A POSTMARK, WHICH THE TAX COURT SHOULD HAVE ACCEPTED AS TIMELY FILING UNDER THE FOREGOING STATEMENT OF CONGRESSIONAL INTENT, IMPLEMENTED IN 26 U.S.C. 7502(b):

4.) WHETHER THE OPINIONS BELOW RELYING UPON **BLANK v. COMMISSIONER** DISALLOWING ANY FILING BY PRIVATE MAIL CARRIERS ARE UNLAWFULLY CONSTRUING 26 U.S.C. 7502(b) TO DENY TAXPAYERS DUE PROCESS RIGHTS UNDER THE UNITED STATES CONSTITUTION, CONTRARY TO PLAIN CONGRESSIONAL INTENT?

5.) WHETHER THE ISSUE HEREIN IS IMPORTANT TO THE PROPER CONSTRUCTION OF THE INTERNAL REVENUE CODE AND APPLICATION AND INTERPRETATION OF CONGRESSIONAL INTENT AS PLAINLY EXPRESSED IN **U.S. AND CONGRESSIONAL AND ADMINISTRATIVE NEWS**, 4017 AT 4053 (1954), WHERE THE REMEDIAL PURPOSE OF 26 U.S.C. 7502(b) WAS TO ALLOW THE PUBLIC TO NOT JUST USE U.S. POSTAL METERS FOR TIMELY FILING BY PRIVATE MAILINGS, BUT THAT THE PUBLIC IN DEALING WITH THE IRS AND THE TAX COURT COULD ALSO USE "OTHER DEVICES" FROM PRIVATE CARRIERS TO EFFECTIVELY FILE WITH THE TAX COURT?

6.) WHETHER THE JUDICIAL LIMITATION IMPOSED UPON THE REMEDIAL PURPOSE OF SECTION 26 U.S.C. 7502(b), CONSTRUCTED IN **BLANK v. COMMISSIONER**, THAT CONGRESS INTENDED THAT "POSTMARKS NOT MADE BY THE UNITED STATES POSTAL SERVICE" **MEANS ONLY PRIVATE MAILINGS MADE BY POSTAL METERS**, CONTRADICTS PLAIN CONGRESSIONAL INTENT TO THE CONTRARY; AND CONSTITUTES IMPROPER JUDICIAL NARROWING OF THE REMEDIAL GOALS OF SECTION 7502(b)?

7.) WHETHER THE PRESENT DECISION IS IMPORTANT TO THIS COURT'S CONSIDERATION, WHERE TAXPAYERS ENJOY SUBSTANTIAL RIGHTS AS LITIGANTS BEFORE THE TAX COURT IN THAT THEY ARE NOT REQUIRED TO PAY DISPUTED TAXES AND PENALTIES DUE BEFORE EXERCISING THEIR RIGHT TO CHALLENGE ASSESSEMTS BY THE COMMISSIONER AND THE PRESENT DECISION UNLAWFULLY DENYS TAXPAYERS ACCESS TO THE TAX COURT IN A MANNER WHICH CONGRESS PLAINLY INTENDED.

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I.
OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eleventh Circuit affirming the dismissal by the U.S. Tax Court for filing by Federal Express rather than by U.S. Postal meter, citing **Pugsley v. Commissioner** and **Blank v. Commissioner** is contained the Petitioners' Appendix at A49-A50 and will not be reported in the Federal Third publication of West Publishing.

The opinions of the United States Tax Court dismissing the Petitoners' petitions for filing by Federal Express rather than U.S. Postal meter is contained in the Petitioners' Appendix at A38-A40; A41-A43 and will be reported in the Tax Court Reports of the United States.

II.

JURISDICTION

On June 30, 1995 the United States Court of Appeals for the Eleventh Circuit affirmed the Tax Court's dismissal because the Petitioners filed by Federal Express rather than using a U.S. postal meter. A49-A51.

On September 25, 1995, the United States Court of Appeals for the Eleventh Circuit denied the Petitioners motion for rehearing. A52-A53.

However, on December 6, 1995 the United States Eleventh Circuit Court of Appeals stayed its mandate pending review by the United States Supreme Court. A56.

III.

CONSTITUTIONAL AND STATUTORY PROVISIONS

Amendment V of the Constituition of the United States provides **inter alia** that:

> "[No person} shall be compelled in any criminal case to be deprived of life, liberty, or property without due process of law . . . "

Title 26 United States Code Section 7502(b), entitled, "Timely mailing treated as timely filing and paying", provides **inter alia** that:

> "(a) General rule.-
> (1) Date of delivery.- If any return, claim, statement, or other document required to be filed, or any payment required to be made, within a prescribed period or on or before a prescribed date under authority of any provision of the internal revenue laws is, after such period or such date, delivery by United States mail to the agency, officer, or office with which such return, claim, statement, or other document is required to be filed, or to which such payment is required to be made, the date of the United States postmark stamped on the cover in which such return, claim, statement, or other document, or payment, is mailed shall be deemed to be the date of delivery or the date of payment, as the case may be.
>
> * * *

> "(b) Postmarks- This section shall apply in the case of postmarks not made by the United States Postal Service only if and to the extent provided by regulations prescribed by the Secretary."

Tile 26 of the Code of Federal Regulations promulgated by the Secretary pursuant to the foregoing authority at 301.7502-1(b) provides **inter alia** that:

> "(b) If the postmark on the envelope or wrapper is made other than by the U.S. Post Office, (1) the postmark so made must bear a date on or before the last date, or the last day of the period, prescribed for filing the document, and (2) the document must be received by the agency, officer, or office with which it is required to be filed not later than the time when a document contained in an envelope or other appropriate wrapper which is properly addressed and mailed and sent by the same class of mail would ordinarily be received if it were postmarked at the same point of origin by the U.S. Post Office on the last date, or the last day of the period, prescribed for filing the document."

U.S. Congressional and Adminstrative News 4017, at 4583 (1954) provides **inter alia** that:

> "Section 7502. **Timely mailing treated as timely filing.** This new section applies in the case where documents (other than returns) are mailed to the proper office

within the time prescribed by the internal-revenue laws, as indicated by the postmark on the envelope, and are received by that office after such time has expired. In such case, the document is deemed timely filed.

Since it is possible to predate postmarks where mailing machines or other devices are use, subsection (b) provides that a postmark not made by the United States post office shall be deemed the date of delivery only to the extent permitted by regulations. If the document is sent by registered mail rather than ordinary mail, the registration before the due date is prima facie evidence that the document was delivered to the proper officer, and the date of registration is deemed the date of mailing.

This section does not apply to the filing of a document in any court other than the Tax Court."

IV.

STATEMENT OF THE COURSE OF PROCEEDINGS

For the purposes of this Petition, the Petitioner/taxpayes will be referred to as WEISSMAN collectively since the issue and records in each case are identical and on September 26, 1994 the appeals court consolidated these cases for all purposes. A48.

On October 7, 1993 notices of deficiency were mailed to the Appellants. In a timely fashion, on the ninetieth day thereafter WEISSMAN **pro se** each submitted petitions for review in the United States Tax Court by and through the private mail services provided by Federal Express. A8-A13 and A14-A19. The petitions were marked as received by the Clerk of the Tax Court on January 6, 1994. **See**, A32-A31; A32-A37 (motions to confirm).

On February 7, 1994 the Respondent/Appellee, COMMISSIONER of INTERNAL REVENUE, filed her Motion to Dismiss contending that under **Blank v. Commissioner**, 76 T.C. 400 (1981) as subsequently followed in **Pugsley v. Commissioner**, 749 F.2d 691 (11th Cir. 1985), that the Court should dismiss the WEISSMAN petitions because WEISSMAN used the private mailing service of Federal Express rather than Pitney Bowes and therefore the Petitions were received by the Tax Court by federal express courier on January 6, 1994. A20-A22 and A23-A25.

In response WEISSMAN contended that their Petitions were timely filed as postmarked on January 5, 1994 under 26 U.S.C. 7502(b) in that they were mailed using the private mail service of Federal

Express. A26-A31 and A32-A37.

On February 15, 1994 without a hearing or any further pleadings or affidavits, the Tax Court granted the Commissioner's motion to dismiss, relying upon **Blank v. Commissioner**, 76 T.C. 400 (1981) for the proposition stated therein that 26 U.S.C. Section 7502(b) provides that Congress intended that private mailing by federal express is not "filing" with the Tax Court under the statute; and the statute allows only delivery by the U.S. Postal Service (using Pitney Bowes private mail service). A38-A40 and A41-A43.

A timely notice of appeal to the United States Court of Appeals for the Eleventh Circuit was filed from each order of dismissal. A44-A45 and A46-A47. The appeal proceeding followed before a panel of the United States Court of Appeals for the Eleventh Circuit.

Both the Appellants and the Commissioner requested oral argument. However, without oral argument the panel of the Appeals Court affirmed the Tax Court's dismissal, without any discussion of the statement of Congressional intent in **U.S. and Congressional Adminstrative News**, 4017, at 4503 (1954). Instead, the panel of the Appeals Court relied upon **Blank v. Commissioner** and the previous panel decision of the Eleventh Circuit Court in 1985 in **Pugsley v. Commissioner**, which in turn relied upon **Blank v. Commissioner**. A49-A50.

WEISSMAN filed its timely petition for rehearing and petition for rehearing **en banc**. On September 25, 1995 the Appeals Court denied the petition for

rehearing and the petition for rehearing en banc. A51-A52.

However, on October 30, 1995 the Appeals Court recalled its mandate, where counsel for WEISSMAN had not been provided a copy of the Court's order on the motions for rehearing. A53-A54.

On December 6, 1995 the Appeals Court stayed its mandate pending further review in this Court upon WEISSMAN's argument that this was an important issue for this Court's consideration and the Appeals Court had plainly failed to adhere to Congressional intent in providing for a remedial purpose of filing by mail. A55.

V.

SUMMARY OF ARGUMENT

The issue herein is important to the proper construction of the Internal Revenue Code and proper application and interpretation of Congressional intent as plainly expressed in **U.S. and Congressional and Administrative News**, 4017 at 4053 (1954), where the remedial purpose intended by Congress in 26 U.S.C. 7502(b) was to allow the public to be able to file in the U.S. Tax Court, by not just the use of U.S. postal meters for timely filing by private mailings, but that the public in dealing with the IRS and the Tax Court could also use "**other devices**" to effectively file with the Tax Court in using private mail services.

The issue construed by the Courts below flys into the face of the plain meaning intent of Congress when it enacted the statute and directly affects a national court within this Court's authority to supervise and correct. It is therefore important to this Court's consideration that a U.S. statute, 26 U.S.C. Section 7502(b), has been unlawfully construed in derogation of plain Congressional intent as plainly expressed in **U.S. and Congressional and Administrative News**, 4017 at 4503 (1954), when Congress enacted the remedial statute, 26 U.S.C. 7502(b), that the public could use postal meters "or other devices" to obtain filing with the Tax Court.

The artificial judicial limitation imposed upon the remedial purpose of Section 26 U.S.C. 7502(b), constructed in **Blank v. Commissioner** and

followed by the Eleventh Circuit in **Pugsley v. Commissioner** that Congress instead intended that "postmarks not made by the United States Postal Service" **means only private mailings made by postal meters**, contradicts plain Congressional intent to the contrary; and constitutes improper judicial narrowing of the remedial goals of Section 7502(b).

The 1985 panel decision of the United States Eleventh Circuit Court of Appeals, in **Pugsley v. Commissioner** relied upon by the Eleventh Circuit herein and which relied upon **Blank v. Commissioner**, without analysis of the foregoing clear statement of Congressional intent to the contrary, is an important and substantial departure from Congressional intent and legitimate statutory construction and this Court should accept jurisdiction over this important issue, which has impact upon tens of thousands taxpayers nationwide as to their right to access to the Tax Court by the means prescribed by Congress.

Finally, the present issue is important to this Court's jurisdiction, where taxpayers enjoy substantial rights in the Tax Court to challenge assessments by the Commissioner, without paying disputed taxes and assessments before exercising their challenge. The present decision denys access to the Tax Court, which Congress plainly intended to be available to taxpayers, who file by private mail services using "other devices".

VI.

ARGUMENT

The Commissioner in her answer brief and the panel of the Court below doggedly track the **Blank v. Commissioner** analysis, but fail at anytime to explain or address the plain manifestation of Congressional intent contradicting the **Blank v. Commissioner** reasoning, which is published in **U.S. Congressional and Adminstrative News** 4017, at 4583 (1954), appended hereto. The **Blank** Court's [and the Panel's] entire analysis rests upon the fiction announced at 76 T.C. at 405, that Congress did **not** mean to include anything except "**postage meters**", when it said the citizens of the United States in dueling with the Internal Revenue Service could file with the Tax Court by using private mail services. However, there is no citation in the **Blank** Court opinion as to what the lawful basis for such a conclusion might be, or whether the Court was ever presented with the statement of Congressional intent in enacting Section 7502(b) contained in **U.S. Congressional and Adminstrative News** 4017, at 4583 (1954).

Contrary to the Blank Court's [and the panel's] analysis, in enacting Title 26 U.S.C. Section 7502(b) Congress announced in **U.S. Congressional and Adminstrative News** 4017, at 4503 (1954), that Congress intended the remedial provision of Section 7502(b) to apply to service by private mailing using not just "postal meters", but to private mail service by, "**mailing machines, or other devices**":

> "Since it is possible to predate postmarks where **mailing machines, or other devices** are used, sub-section (b) provides that a postmark not made by the United States post office shall be deemed the date of delivery only to the extent permitted by regulations." [Emphasis added]. **Id.**

Thus, following Congressional intent and the statutory scheme under 26 U.S.C. 7502(b), the operative fact for "**date of delivery**" for filing with the Tax Court, is the **postmark** by "**mailing machines or other devices**":

> "(b) **Postmarks.**---This section shall apply in the case of postmarks **not made by the United States Postal Service** only if and to the extent provided by regulations prescribed by the Secretary." [Emphasis added].

On the face of Section 7502 contrary to the strained analysis of the **Blank** court and the panel below, the "hallmark" of Section 7502 is not who makes the postmark or delivers the document, but rather the postmark itself, which under Congressional intent evidences "**delivery**". **See, Estate of Wood v. Commissioner**, 909 F.2d 1155, at 1161 (8th Cir. 1990).

Accordingly the regulations promulgated by the Secretary, therefore place the only limitation allowed herein, to wit: a.) that the private mail "machine or device" provided a date which is within the time allowed for filing; and b.) that the document was received within the time that the U.S. Postal service would have delivered it if it was postmarked by the U.S. Postal Service. 26

C.F.R. 301.7502-1(c)(1)(iii)(b) appended hereto. **Accord**, **Leventis v. Commissioner**, 49 T.C. 353, at 355 (1968).

In sincere candor, the Commissioner has conceded below that the Secretary's requirement of meeting the U.S. Postal Service's delivery time in "b.)" above was satisfied herein, where the private mailing and delivery to the Tax Court by Federal Express in one (1) day, was better than if the papers had been handled by the United States Postal Service. **Appellee's Answer Brief**, at p 16. Additionally, it is undisputed herein that under the foregoing Secretary's regulation at "**a.)**", the postmark on the documents was within the ninety (90) day statutory requirement for invoking the jurisdiction of the Tax Court. **Appellee's Answer Brief**, at p.5.

Sub judice, there is nothing left of the apppellate panel's argument, but the grafting by **Blank v. Commissioner** upon the statute that the statutory "postmark" is not delivery, where physical delivery is not then also only made by "U.S. Postal Service." In sum, the panel and the **Blank** Court would thereby defeat the "**postmark**" as delivery announced by Congress in Section 7502 and reimpose a physical delivery only by the U.S. Postal Service requirement.

It has been solely by the device of **Blank v. Commissioner** that the Commissioner has been able to circumvent Congressional intent in enacting Section 7502, to impose the Commissioner's view that even in the face of the enactment of Section 7502, that still, only physical delivery is "delivery". **Compare**, **Hotel**

Equities Corp. v. Commissioner, 546 F.21d 725, at 727-728 (7th Cir. 1976)(in the face of the plain language of Section 7502 the Commissioner argues that physical delivery is delivery rather than the "postmark").

This Court has jurisdiction where the construction by the courts below or the agency below is hindering the effective administration of the statute. United States v. Rizicka, 329 U.S. 287 (1946); Rothensies v. Electric Battery Co., 329 U.S. 296 (1946); Morton v. Ruiz, 415 U.S. 199, at 201-202 (1974)(the interpretation given the statute by the adminstrative agency is at war with well established principals of statutory construction). This Court should furthermore exercise jurisdiction, where the issue concerns a potentially large number of cases or the construction of a federal statute. See, Laing v. United States, 423 U.S. 161 (1976)(70 cases dependent upon the ruling); United States v. Donovan, 429 U.S. 413, at 422 (1977); Aklaska v. American Can Co., 358 U.S. 224, at 225 (1959)(although tax statute repealed the issue is important to Alaska); Hinderlider v. La Plata Co., 304 U.S. 92, at 101, 110 (1938)(issue important to state or United States); Petty v. Tennessee Missouri Comm., 359 U.S. 275, at 278 (1955).

Furthermore, this Court has certiorari jurisdiction to correct the error herein in the face of the remedial purpose Congress had in enacting the statute, which is plainly defeated by the construction imposed by the Courts below. See, e.g., New York Transit Authority v. Beazer, 440 U.S. 568 (1979)(the merits of the important questions below was "decided

erroneously"); **Great Lakes Dredge v. Huffman**, 319 U.S. 293, at 296 (1943)(**because of the public importance of the questions decided we granted certiorari**); **Williams v. Lee**, 358 U.S. 217, at 218 (1959)(court assumed jurisdiction to correct recurring error in interpretation of the statute); **Ivan Allen Co. v. United States**, 422 U.S. 617, at 623-624 (1975)(certiorari granted on claim of "conflict in principle" in interpretation of tax law; **and** importance of the issue); **Oregon Department of Fish and Wildlife v. Klamath Tribe**, 473 U.S. _____(1985)(conflict appearing upon principle); **Florida v. Rodriguez**, 469 U.S. 1 (1984)(plainly erroneous construction by appeal court for the second time in the same case); **see, also**, Justice Rehnquist "**Oral Advocacy: A Disappearing Art**" 35 Mercer L.Rev. 1015, at 1027 (1984)(the most common reason why members of the Court vote for certiorari is that they doubt the correctness of the decision below).

In the present case, all of the foregoing prevailing reasons for certiorari are present warranting the sound exercise of this Court's jurisdiction herein. This is an important federal statute of concern to each and every citizen and taxpayer, which is plainly being erroneously construed by the governmental agency charged with its proper adminstration. Moreover, the courts below have bought into to the reasoning by the Commissioner and the tax court without **ever** considering the plain expression of Congressional intent, when Congress enacted this remedial statute. In sum, citizens and taxpayers are being denied access to the Tax Court and their substantial ability to challenge erroneous

assessments and fines contrary to Congressional intent to allow their right to access.

This Court should therefore put an end to the effort of the Commissioner through the device of **Blank v. Commissioner** to defeat Congressional intent in enacting in Section 7502 by imposing the physical-delivery-only-by the-U.S.-Postal-Service-is-delivery, requirement upon the statute. The Commissioner's analysis is a patent absurdity of statutory construction, where the entire scheme of the statute is that **delivery** is the "**postmark**". **E.g.**, **Estate of Wood v. Commissioner**, 909 F.2d at 1161. Congress, consistent with the remedial purpose of the statute, created Section 7502(b), which extends to citizens the right to use postmarks of private mail services to establish filing under the statute, which this Court should not allow the Commissioner to defeat in the face of the plainly remedial purpose of the statute. **See**, **Drake v. Commissioner**, 554 F.2d 736, at 739 (5th Cir. 1977)(court will not create an exception, which violates the statutory scheme and undermines the purpose of the provision); **Skolski v. Commissioner**, 351 F.2d 485, at 488 (3d Cir. 1965)(Court will not narrow the scope and thus unwarrantedly defeat the remedial purpose of a statute); **compare**, U.S.11th Cir. FRAP IOP 1 "Timely Filing of Papers" (briefs timely postmarked by commercial or public carriers are timely filed).

Finally, the fiction created by the Courts below that this is a matter for Congress to correct and Congress has not acted, is also erroneous. This Court in **Scripps-Howard v. Commissioner**, 316 U.S.

1, at 11 (1943) observed the fallacy in such reasoning, explaining that:

> "[t]he search for significance in the **silence** of Congress is too often the **pursuit of a mirage**." [Emphasis added].

In the present case, the Commissioner and the Courts below have acted upon a mirage instead of addressing the plain intent of Congress in enacting the present remedial statute allowing filing by private mailing using not only the U.S. Post Office, but also private carriers and their "**other devices**".

CONCLUSION

This Court consistent with its settled statutory construction and plain expression of Congressional intent should exercise its jurisdiction herein and construe Section 26 U.S.C. Section 7502(b) to favor these pro se litigants before the Tax Court and follow the remedial purpose Congress intended when enacting 26 U.S.C. Section 7502(b) to allow filing with the Tax Court by private mailings using postal meters and other private mailing devices such as that used herein.

The construction imposed by the **Blank** Court is not based upon the literal language of the statute, but instead is predicated upon a "guess" by the Tax Court, which improperly restricts the statute in the face of the plain language of 26 U.S.C. 7502(b), which has no such restriction.

Following the foregoing facts and circumstances, this Court should exercise its sound discretion herein and accept jurisdiction upon the principal that the lower court decisions are at war with the plain intent of Congress as expressed in the U.S. Congressional and Adminstrative News, as allowed in **Morton v. Ruiz**, 415 U.S. at 201-202 (decision below inconsistent with Congressional intent as applied by agency); and **American Federation of Musicians v. Wittstein**, 379 U.S. at 175 (1964)(court accepted jurisdiction because of importance of issue of proper statutory construction); **United States v. Donovan**, 429 U.S. at 422 (Court accepted jurisdiction because of issue of proper construction of major federal statute); **Williams v. Lee**, 358 U.S. at 218 (1959)(in recurrent

constitutional, statutory, or procedural error the Court will grant certiorari).

Additionally, the decision of this Court is subject to review by this Court because of the importance of the proper administration of the statute as allowed for jurisdiction in **United States v. Ruzicka**; and **Rosthensies v. Electric Battery**, **supra** and in particular failure to properly interpret the tax laws by the Tax Court causing confusion amoung the Courts should cause this Court to accept this matter for review as well as the vast national importance of the proper construction of the right of review by taxpayers throughout the country. **See**, **Deidrich v. Commissioner**, 457 U.S. at 194 (1982); **Jewett v. Commissioner**, 455 U.S. at 308-309 (1977); **United States v. Generes**, 405 U.S. 93, at 96 n4 (1972); **Laing v. United States**, 423 U.S. at 167 (1976)(seventy cases dependent upon the resolution of tax code issue by the U.S. Supreme Court).

Should this Court not act herein, the alternative to these ordinary taxpayers and others similarly situated is to refile in the U.S. District Court, but they will be then required to pay the entire amount the IRS feels is due to date, before they may proceed with the same challenge as raised in these proceedings.

These ordinary taxpayers and others similarly situated are unable to contest these matters in such a fashion by paying all that the IRS says is due before they may continue to challenge the legality of the additional assessment and at the same time continue to maintain their legitimate challenge in this Court to the Tax Court's plainly erroneous ruling. These

ordinary taxpayers and others similarly situated, are not be able to sustain further review of this cause, which has substantial merit and unless the undersigned is able to obtain review upon in this Court, without a continuation of this Court's most gracious grant of certiorari.

WHEREFORE, upon the foregoing and such other terms as this Court deems just, the Petitioners, MICHAEL WEISSMAN and LINDA WEISSMAN; and RICHARD S. WEISSMAN and ROBIN WEISSMAN, pray that this Honorable Court will grant certiorari and upon review reverse the affirmance by the United States Court of Appeals for the Eleventh Circuit of the dismissal by the Tax Court and order that this cause should proceed upon the Petitions filed by the Appellants.

RESPECTFULLY SUBMITTED, on this 26th day of September, 1995 at Fort Lauderdale, Broward County, Florida.

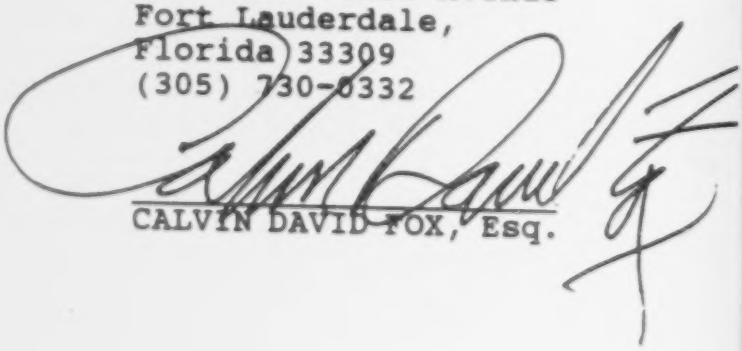
LAW OFFICES of
CALVIN DAVID FOX
4517 N.W. 31st Avenue
Fort Lauderdale,
Florida 33309
(305) 730-0332

CALVIN DAVID FOX, Esq.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY, that a true and correct copy of the enclosed Petition for Certiorari was caused to be served by United States Mail First Class delivery pre-paid, to Gary Allen, Chief of Appeals and John Nolet, Counsel for the Respondents, Tax Division, United States Department of Justice, P.O. Box 502, Washington, D.C., 20044 (Telephone No. (202) 514-3361) and Solicitor General, Department of Justice, Washington, D.C., 20530 (Telephone No. (202) 514-2201) on this 26th day of December, 1995.

LAW OFFICES of
CALVIN DAVID FOX
4517 N.W. 31st Avenue
Fort Lauderdale,
Florida 33309
(305) 730-0332



CALVIN DAVID FOX, Esq.

APPENDIX TO

BRIEF OF PETITIONER ON JURISDICTION

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[EXCERPT]

INTERNAL REVENUE CODE

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* * * * *

CHAPTER 77 - MISCELLANEOUS PROVISIONS

§ 7502. Timely mailing treated as timely filing

This new section applies in the case where documents (other than returns) are mailed to the proper office within the time prescribed by the internal-revenue laws, as indicated by the postmark on the envelope, and are received by that office after such time has expired. In such case, the document is deemed timely filed.

Since it is possible to predate postmarks where mailing machines or other devices are use, subsection (b) provides that a postmark not made by the United States post office shall be deemed the date of delivery only to the extent permitted by regulations. If the document

is sent by registered mail rather than ordinary mail, the registration before the due date is prima facie evidence that the document was delivered to the proper officer, and the date of registration is deemed the date of mailing.

This section does not apply to the filing of a document in any court other than the Tax Court.

* * * * *

[EXCERPT 26 U.S.C § 7502]

26 § 7502 PROCEDURE AND ADMINISTRATION
Subtitle F

§ 7502. Timely mailing treated as timely filing and paying

(a) General rule.-

(1) Date of delivery.- If any return, claim, statement, or other document required to be filed, or any payment required to be made, within a prescribed period or on or before a prescribed date under authority of any provision of the internal revenue laws is, after such period or such date, delivery by United States mail to the agency, officer, or office with which such return, claim, statement, or other document is required to be filed, or to which such payment is required to be made, the date of the United States postmark stamped on the cover in which such return, claim, statement, or other document, or payment, is mailed shall be deemed to be the date of delivery or the date of payment, as the case may be.

* * * * *

(b) Postmarks.- This section shall apply in the case of postmarks not made by the United States Postal Service only if and to the extent provided by regulations prescribed by the Secretary.

* * * * *

[EXCERPT 26 C.F.R. 301.7502-1]

CODE OF FEDERAL REGULATIONS

INTERNAL REVENUE

26

PARTS 300 TO 499
Revised as of April 1, 1994

* * * * *

THE TAX COURT

PROCEDURE

301.7502-1

* * * * *

(b) If the postmark on the envelope or wrapper is made other than by the U.S. Post Office, (1) the postmark so made must bear a date on or before the last date, or the last day of the period, prescribed for filing the document, and (2) the document must be received by the agency, officer, or office with which it is required to be filed not later than the time when a document contained in an envelope or other appropriate wrapper which is properly addressed and mailed and sent by the same class of mail would ordinarily be received if it were postmarked at the same point of origin by the U.S. Post Office on the last date, or the last day of the period, prescribed for filing the document.

* * * * *

[EXCERPT FRAP WITH ELEVENTH CIRCUIT RULE 25]

I.O.P.- 1. Timely Filing of Papers

Except for briefs and record excerpts, *all other papers*, including petitions for rehearing, shall not be timely unless they are actually received in the clerk's office within the time fixed for filing. Briefs and record excerpts shall be deemed filed on the day of mailing if an expedited form of delivery by mail (public or commercial) is used.

IN THE UNITED STATES TAX COURT

MICHAEL WEISSMAN and LINDA WEISSMAN,	)	
	)	
vs.	)	**DOCKET**
	)	**NO:_____**
COMMISSIONER	)	

PETITION

NOW COMES, MICHAEL WEISSMAN, SSN# 143 30 8208 and LINDA WEISSMAN, SSN# 137 34 0348 Husband and Wife, and hereby file this Petition for relief before the United States Tax Court, and state as follows:

1. Michael Weissman was, in 1987 and 1988, one hundred (100%) percent owner of Child Care Systems, Inc. Subsequently, in 1989, Child Care Systems, Inc., was owned thirty-two and one-half (32 1/2%) percent by Michael Weissman, and thirty-two and one-half (32 1/2%) percent by Linda Weissman (collectively referred to as "The Taxpayers"). During 1989, Child Care Systems, Inc., was owned ten (10%) percent by Lisa Vitello, the Weissman daughter.

2. The Taxpayers, through their Tax Accountant, Jesse Small, CPA of Hallandale, Florida, submitted to the Internal Revenue Service, copies of guaranteed Notes to several different individuals relating to Child Care Systems, Inc., signed by Michael Weissman, President of Child Care Systems, Inc. These Notes all have balloon payment provisions maturing on or about 1998, with defined rates of interest paid by Child Care Systems, Inc. Michael Weissman is the Guarantor of all of these notes, totaling TWO HUNDRED THOUSAND THREE HUNDRED SEVENTY EIGHT and 48/100 ($200,378.48) which entitles The Taxpayers basis to declare and take applicable losses for the tax years

1988 and 1989.

3. As guidance supporting The Taxpayers declaration of applicable losses for the above-described tax years, we direct your attention to: **Edward M. Selfe and Jane B. Selfe vs. The United States of American** 778 Federal 2nd 769 et seq. (11th Circuit, 1985).

In Selfe vs. US., the Eleventh Circuit Court of Appeals, Circuit Judge Kravitch writing, held that a shareholder who guarantees a loan to a Sub Chapter S corporation **may increase her basis** where the **facts demonstration** that, **in substance the shareholder has borrowed funds and subsequently advanced them to her corporation**. Judge Kravitch wrote that the Eleventh Circuit's task was to determine whether a shareholder in a Sub Chapter S corporation, who personally guarantees and secures a corporation debt, may increase the adjusted basis of her stock by the full amount of the debt in order to maximize her loss deductions under former Internal Revenue Code ("IRC") Section 1374. Former IRC Section 1374, in effect during the years in issue here, permits a shareholder in a Sub Chapter S corporation to deduct his portion of the corporation's net operating loss from his personal income, limited however to the sum of the adjusted basis of the shareholder's stock in the corporation, **plus the adjusted basis of any indebtedness of the corporation to the shareholder**.

4. The United States Court of Appeals for the Fifth Circuit in **Plantation Patterns, Inc., v. Commissioner** 462 Federal 2D 712 (1972), opined that a loan is deemed to be made to a stockholder who has guaranteed a corporate note when the facts indicate the Lender is looking primarily to the stockholder for repayment.

5. Judge Kravitch, reflected that the

Eleventh Circuit found **partially persuasive** that portion of **Brown vs. Commissioner**, 706 Federal 2D 755 (6th Circuit 1963), wherein the Court reaffirmed that economic outlay is required before a stockholder in a Sub Chapter S corporation may increase her basis, but **disagreed** with the proposition that a stockholder/taxpayer must, in all cases, absolve a corporation's debt before she may recognize an increased basis as a Guarantor of a loan to a corporation. Instead, the Eleventh Circuit concluded that under the principles of **Plantation Patterns**, a shareholder who has a loan to a Sub Chapter S corporation may increase her basis where the facts demonstrate that, in substance, the shareholder has borrowed funds and subsequently advanced them to her corporation. Judge Kravitch further narrowed the issues, stating "the issue is whether the taxpayer's Guarantee of the corporate loan was in itself a contribution to the corporation sufficient to increase the taxpayer's basis in the corporation."

6. Under the principles of Plantation Patterns, a shareholder guarantee of a loan may be treated for tax purposes as an equity investment in the corporation where the Lender looks to the shareholder as the primary obligor. Essential to the Plantation Patterns court's analysis was **that the Notes guaranteed by the shareholder were issued by a thinly capitalized corporation and had more equity characteristics than debt.**

7. In our case, Child Care Systems, Inc., was a thinly capitalized corporation, and it is inconceivable that several individuals would have loaned an aggregate of TWO HUNDRED THOUSAND THREE HUNDRED SEVENTY EIGHT and 48/100 ($200,378.48) DOLLARS to it without relying upon the personal guarantee of Michael Weissman or other members of the Weissman family.

8. Further applying the factors set out in IRC Section 385, and **In Re Lane 742 Federal 2nd at Page 1315**, to the facts of our case, we are clearly entitled to the losses we claimed for 1988 and 1989.

9. Now the Audit Division of the service, asserts that **Selfe v. U.S.** is countered by a later case, **Estate of Leavitt v. Commission**, 90 Tax Court 206 (1988).

First, we want you to be aware that the Audit Division's citation is wrong. The tax case at 907C 206 involves Dominion Trust Company and has no apparent relation to the issues at hand.

10. Second, the CCH Tax Service does report a case as **Estate of Leavitt v. Commissioner**, but its citation is 90 Tax Court 16 (90TC16).

11. Third, if we assume that the Audit Division was contemplating Estate of Leavitt as a counter to our Selfe Case, then we want you to be aware of the following:

12. In **Estate of Leavitt**, the tax court sought to determine whether a shareholder's guarantee of the debt of an electing small business corporation under Sub Chapter S of the Internal Revenue Code increases the shareholder's basis in his stock in the corporation.

13. The tax court disagreed with the Eleventh Circuit and held that a shareholder's guarantee of a loan to a Sub Chapter S corporation may not be treated as an equity investment in the corporation **absent an economic out lay by the shareholder.**

14. However, the teaching of the Selfe Case in **the current expression of the law in the**

Eleventh Circuit. We reside in and conducted the business of Child Care Systems, Inc., in the Eleventh Circuit.

15. Persuasive minority opinion of Judge Fay of the Tax Court, reflect that the majority in **Estate of Leavitt** erred by not recognizing the applicability of traditional debt-equity principles in determining the federal tax effect of Petitioners' guarantees and by not recognizing the existence and presence of the type of economic outlay provided by Petitioners. Accordingly in **Estate of Leavitt**, the Petitioners are arguing that they are entitled to an increase in their "adjusted basis" of the shareholders stock in the electing small business corporation as used in former Section 1374 (c) (2) (a):

1. Debt-equity principles are applicable in determining whether a shareholder guaranteed corporate debt should be characterized as a capital contribution.

2. Two types of economic outlay exist:

   a. One as stated in **Estate of Leavitt**

   b. Another as reflected **In Re Lane** where the debt is initially treated as the shareholder/guarantor debt.

In such a situation, the shareholder/ guarantors' deemed transfer of the loan proceeds to the corporation **is the economic outlay**.

THEREFORE, The Taxpayers have clear and persuasive evidence that economic outlay occurred in The Taxpayers situation a la **In Re Lane** where the debt is initially treated as the shareholders' debt and the loan proceeds are

deemed transferred from the third party creditor to the shareholder to the corporation.

On the basis of all of the foregoing, The Taxpayers respectfully request this Honorable Court to grant The Taxpayers deduction of applicable losses for Tax Years 1988 and 1989, and such other and further relief as this Court deems appropriate.

Michael Weissman, Taxpayer
SSN # 143-30-8208

Linda Weissman, Taxpayer
SSN # 137-34-0348

IN THE UNITED STATES TAX COURT

RICHARD S. WIESSMAN and ROBIN WEISSMAN,	)	
vs.	)	**DOCKET NO:** _____
COMMISSIONER	)	

PETITION

NOW COMES, RICHARD S. WEISSMAN, SSN# 146-44-4001 and ROBIN WEISSMAN, SSN# 267-11-5702, Husband and Wife, and hereby file this Petition for relief before the United States Tax Court, and state as follows:

1. Michael Weissman was, in 1987 and 1988, one hundred (100%) percent owner of Child Care Systems, Inc. Subsequently, in 1989, Child Care Systems, Inc., was owned thirty-two and one-half (32 1/2%) percent by Michael Weissman, and thirty-two and one-half (32 1/2%) percent by Linda Weissman. During 1989, Child Care Systems, Inc., was owned twenty-five (25%) percent by Richard S. Weissman.

2. The Taxpayers, through their Tax Accountant, Jesse Small, CPA of Hallandale, Florida, submitted to the Internal Revenue Service, copies of guaranteed Notes to several different individuals relating to Child Care Systems, Inc., signed by Michael Weissman, President of Child Care Systems, Inc. These Notes all have balloon payment provisions maturing on or about 1998, with defined rates of interest paid by Child Care Systems, Inc. Michael Weissman is the Guarantor of all of these notes, totaling TWO HUNDRED THOUSAND THREE HUNDRED SEVENTY EIGHT and 48/100 ($200,378.48) which entitles The Taxpayer basis to declare and take applicable losses for the tax years 1988

and 1989.

3. As guidance supporting The Taxpayers declaration of applicable losses for the above-described tax years, we direct your attention to: **Edward M. Selfe and Jane B. Selfe vs. The United States of American** 778 Federal 2nd 769 et seq. (11th Circuit, 1985).

In Selfe vs. US., the Eleventh Circuit Court of Appeals, Circuit Judge Kravitch writing, held that a shareholder who guarantees a loan to a Sub Chapter S corporation **may increase her basis** where the **facts demonstration** that, **in substance the shareholder has borrowed funds and subsequently advanced them to her corporation**. Judge Kravitch wrote that the Eleventh Circuit's task was to determine whether a shareholder in a Sub Chapter S corporation, who personally guarantees and secures a corporation debt, may increase the adjusted basis of her stock by the full amount of the debt in order to maximize her loss deductions under former Internal Revenue Code ("IRC") Section 1374. Former IRC Section 1374, in effect during the years in issue here, permits a shareholder in a Sub Chapter S corporation to deduct his portion of the corporation's net operating loss from his personal income, limited however to the sum of the adjusted basis of the shareholder's stock in the corporation, **plus the adjusted basis of any indebtedness of the corporation to the shareholder**.

4. The United States Court of Appeals for the Fifth Circuit in **Plantation Patterns, Inc., v. Commissioner** 462 Federal 2D 712 (1972), opined that a loan is deemed to be made to a stockholder who has guaranteed a corporate note when the facts indicate the Lender is looking primarily to the stockholder for repayment.

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Eleventh Circuit found **partially persuasive** that portion of **Brown vs. Commissioner**, 706 Federal 2D 755 (6th Circuit 1963), wherein the Court reaffirmed that economic outlay is required before a stockholder in a Sub Chapter S corporation may increase her basis, but **disagreed** with the proposition that a stockholder/taxpayer must, in all cases, absolve a corporation's debt before she may recognize an increased basis as a Guarantor of a loan to a corporation. Instead, the Eleventh Circuit concluded that under the principles of **Plantation Patterns**, a shareholder who has a loan to a Sub Chapter S corporation may increase her basis where the facts demonstrate that, in substance, the shareholder has borrowed funds and subsequently advanced them to her corporation. Judge Kravitch further narrowed the issues, stating "the issue is whether the taxpayer's Guarantee of the corporate loan was in itself a contribution to the corporation sufficient to increase the taxpayer's basis in the corporation."

6. Under the principles of Plantation Patterns, a shareholder guarantee of a loan may be treated for tax purposes as an equity investment in the corporation where the Lender looks to the shareholder as the primary obligor. Essential to the Plantation Patterns court's analysis was **that the Notes guaranteed by the shareholder were issued by a thinly capitalized corporation and had more equity characteristics than debt.**

7. In our case, Child Care Systems, Inc., was a thinly capitalized corporation, and it is inconceivable that several individuals would have loaned an aggregate of TWO HUNDRED THOUSAND THREE HUNDRED SEVENTY EIGHT and 48/100 ($200,378.48) DOLLARS to it without relying upon the personal guarantee of Michael Weissman or other members of the Weissman family.

8. Further applying the factors set out in IRC Section 385, and **In Re Lane 742 Federal 2nd at Page 1315**, to the facts of our case, we are clearly entitled to the losses we claimed for 1988 and 1989.

9. Now the Audit Division of the service, asserts that **Selfe v. U.S.** is countered by a later case, **Estate of Leavitt v. Commission**, 90 Tax Court 206 (1988).

First, we want you to be aware that the Audit Division's citation is wrong. The tax case at 907C 206 involves Dominion Trust Company and has no apparent relation to the issues at hand.

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11. Third, if we assume that the Audit Division was contemplating Estate of Leavitt as a counter to our Selfe Case, then we want you to be aware of the following:

12. In **Estate of Leavitt**, the tax court sought to determine whether a shareholder's guarantee of the debt of an electing small business corporation under Sub Chapter S of the Internal Revenue Code increases the shareholder's basis in his stock in the corporation.

13. The tax court disagreed with the Eleventh Circuit and held that a shareholder's guarantee of a loan to a Sub Chapter S corporation may not be treated as an equity investment in the corporation **absent an economic out lay by the shareholder.**

14. However, the teaching of the Selfe Case in **the current expression of the law in the**

Eleventh Circuit. We reside in and conducted the business of Child Care Systems, Inc., in the Eleventh Circuit.

15. Persuasive minority opinion of Judge Fay of the Tax Court, reflect that the majority in **Estate of Leavitt** erred by not recognizing the applicability of traditional debt-equity principles in determining the federal tax effect of Petitioners' guarantees and by not recognizing the existence and presence of the type of economic outlay provided by Petitioners. Accordingly in **Estate of Leavitt**, the Petitioners are arguing that they are entitled to an increase in their "adjusted basis" of the shareholders stock in the electing small business corporation as used in former Section 1374 (c) (2) (a):

1. Debt-equity principles are applicable in determining whether a shareholder guaranteed corporate debt should be characterized as a capital contribution.

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In such a situation, the shareholder/ guarantors' deemed transfer of the loan proceeds to the corporation **is the economic outlay**.

THEREFORE, The Taxpayers clear and persuasive evidence that economic outlay occurred in The Taxpayers situation a la **In Re Lane** where the debt is initially treated as the shareholders' debt and the loan proceeds are

deemed transferred from the third party creditor to the share-holder to the corporation.

On the basis of all of the foregoing, The Taxpayers respectfully request this Honorable Court to grant The Taxpayers deduction of applicable losses for Tax Years 1988 and 1989, and such other and further relief as this Court deems appropriate.

Richard S. Weissman, Taxpayer
SSN # 146 44 4001

Robin Weissman, Taxpayer
SSN # 267-11-5702

IN THE UNITED STATES TAX COURT

MICHAEL WEISSMAN and LINDA WEISSMAN,	)	
Petitioners,	)	
vs.	)	**DOCKET NO: 447-94**
COMMISSIONER OF INTERNAL REVENUE	)	
Respondent	)	

MOTION TO DISMISS FOR LACK OF JURISDICTION

RESPONDENT MOVES that the above entitled case be dismissed for lack of jurisdiction upon the ground that the petition was not filed within the time prescribed by I.R.C. §6213(a) or §7502.

IN SUPPORT THEREOF, respondent respectfully shows unto the Court:

1. The notice of deficiency upon which the above entitled case is based was sent to the petitioners at the address shown thereon by certified mail on October 7, 1993 as shown by the postmark date stamped on the executed Application for Registration or Certification, United States Postal Service Form 3877, a copy of which is attached hereto as Exhibit A.

2. The 90-day period for timely filing a petition with this Court expired on January 5, 1994, which date was not a legal holiday in the District of Columbia.

3. The copy of the petition served on the respondent bears a notation that the petition

was hand delivered to the Tax Court on January 6, 1994.

4. The petition was filed with the Tax Court on January 6, 1994, which date was 91 days after the mailing of the notice of deficiency.

5. The petition was not filed with the Court within the time prescribed by I.R.C. §7213(a) pr §7502. Pugsley v. Commissioner, 749 F. 2d 691 (11th Cir. 1985); Blank v. Commissioner, 76 TC 400 (1981).

WHEREFORE, it is prayed that this motion be granted.

DAVID L. JORDAN
Acting Chief Counsel
Internal Revenue Service

By: _____
SHELDON M. KAY
Assistant District Counsel
Tax Court Bar No. KS0102

By: _____
KENNETH A. HOCHMAN
Senior Attorney
Bar No. HK0097
Atrium West-Suite 240
7771 W. Oakland Park Blvd.
Sunrise, FL 33351
Telephone: (305) 572-5131

Date: 2/1/94

OF COUNSEL:
WILLIAM A. GOSS
Regional Counsel

CERTIFICATE OF SERVICE

This is to certify that a copy of the foregoing MOTION TO DISMISS FOR LACK OF JURISDICTION was served on petitioners, by mailing the same on February 02, 1994 in a postage paid wrapper addressed to them at 16212 Bridlewood Circle, Delray Beach, FL 33445-6674.

This is to further certify that the original of the aforementioned paper was mailed to the Court on February 2, 1994.

KENNETH A. HOCHMAN
Senior Attorney
T.C. Bar No. HK0097
Atrium West-Suite 240
7771 W. Oakland Park Blvd
Tel. No. (305) 572-5131

Date: February 02, 1994

IN THE UNITED STATES TAX COURT

RICHARD WEISSMAN and ROBIN WEISSMAN,	)	
Petitioners,	)	
vs.	)	**DOCKET NO: 448-94**
COMMISSIONER OF INTERNAL REVENUE	)	
Respondent	)	

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4. The petition was filed with the Tax Court on January 6, 1994, which date was 91 days after the mailing of the notice of deficiency.

5. The petition was not filed with the Court within the time prescribed by I.R.C. §7213(a) pr §7502. Pugsley v. Commissioner, 749 F. 2d 691 (11th Cir. 1985); Blank v. Commissioner, 76 TC 400 (1981).

WHEREFORE, it is prayed that this motion be granted.

DAVID L. JORDAN
Acting Chief Counsel
Internal Revenue Service

By: _____
SHELDON M. KAY
Assistant District Counsel
Tax Court Bar No. KS0102

By: _____
KENNETH A. HOCHMAN
Senior Attorney
Bar No. HK0097
Atrium West-Suite 240
7771 W. Oakland Park Blvd.
Sunrise, FL 33351
Telephone: (305) 572-5131

Date: 2/1/94

OF COUNSEL:
WILLIAM A. GOSS
Regional Counsel

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This is to certify that a copy of the foregoing MOTION TO DISMISS FOR LACK OF JURISDICTION was served on petitioners, by mailing the same on February 02, 1994 in a postage paid wrapper addressed to them at 16212 Bridlewood Circle, Delray Beach, FL 33445-6674.

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KENNETH A. HOCHMAN
Senior Attorney
T.C. Bar No. HK0097
Atrium West-Suite 240
7771 W. Oakland Park Blvd
Tel. No. (305) 572-5131

OF COUNSEL:
WILLIAM A. GOSS
Regional Counsel

IN THE UNITED STATES TAX COURT

MICHAEL WEISSMAN and LINDA WEISSMAN,	)	
Petitioners,	)	
vs.	)	**DOCKET NO: 447-94**
COMMISSIONER OF INTERNAL REVENUE	)	
Respondent	)	

MOTION TO CONFIRM JURISDICTION

Petitioners move that this Honorable Court to confirm jurisdiction of the above-styled Case upon the ground that the Petition was filed within the time prescribed by IRC SS 6213(a) or SS 7502.

IN SUPPORT THEREOF, Petitioners respectfully show unto the Court:

1. The Notice of Deficiency upon which the above-entitled Case is based was sent to the Petitioners by certified mail on October 7, 1993, as reflected in the Notice of Deficiency filed in this matter.

2. As of January 4, 1994, the Petitioners had not received the requested Petition Form and accompanying Rules.

3. By telephone on January 4, 1994, to the Office of the Clerk, United States Tax Court, the Petitioners informed a Deputy Clerk that the Petition Form had not been received, but the Deputy Clerk informed the Petitioners that so long as a Petition was postmarked by the Code

established due date, the United States Tax Court will accept such Petition.

4. In reliance upon that representation by the Deputy Clerk, the Petitioners delivered their Petition to Federal Express, as evidenced by the Federal Express Receipt which is dated January 5, 1994, a copy of which is annexed hereto as Exhibit "A" and made a part hereof.

5. The Notice of Receipt of Petition evidenced by the United States Tax Court does not reflect Hand Delivery as asserted by Respondent's Counsel on January 6, 1994, a copy of which is annexed hereto as Exhibit "B" and made a part hereof.

6. The Petition was postmarked January 5, 1994, by deliver of the Petition to Federal Express on that date, consistent with instructions by the Deputy Clerk, United States Tax Court as described above.

THEREFORE, the Petitioners meets the requirements in IRC S 6213(a) or S 7502.

WHEREFORE, the Petitioners pray that this Motion to Confirm Jurisdiction by granted.

_____
Michael Weissman

_____
Linda Weissman

CERTIFICATE OF SERVICE

This is to certify that a copy of the foregoing Motion to Confirm Jurisdiction was served on Kenneth A. Hochman, Esquire by mailing the same on February 4, 1994 in a postage paid wrapper addressed to him at Atrium West-Suite 240, 7771 W. Oakland Park Boulevard, Sunrise, Florida 33351.

This is to further certify that the original of the aforementioned paper was sent Federal Express to the Court on February 4, 1994.

_____
Michael Weissman

_____
Linda Weissman

Exhibit "A"

Federal Express Receipt
Dated January 5, 1994

Exhibit "B"

Notice of Receipt of Petition

Exhibit "B"

UNITED STATES TAX COURT
400 SECOND STREET, N.W.
WASHINGTON, D.C. 20217

Michael & Linda Weissman
6887 Viento Way
Boca Raton, FL 33433-2729

NOTIFICATION OF RECEIPT OF PETITION

Docket No. : 447-94

Name of Case: Michael & Linda Weissman

On January 06, 1994 the Court received and filed a PETITION in the above case.

Further:
(X) Filing Fee Paid

Designation of Place of Trial not received (X)

Petition served on respondent on January 06, 1994

All papers and correspondence MUST bear the DOCKET NUMBER given above.

Charles S. Casazza

Clerk of the Court

Date: January 06, 1994

IN THE UNITED STATES TAX COURT

RICHARD S. WEISSMAN and ROBIN WEISSMAN,	)	
Petitioners,	)	
vs.	)	**DOCKET NO: 448-94**
COMMISSIONER OF INTERNAL REVENUE	)	
Respondent	)	

MOTION TO CONFIRM JURISDICTION

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4. In reliance upon that representation by the Deputy Clerk, the Petitioners delivered their Petition to Federal Express, as evidenced by the Federal Express Receipt which is dated January 5, 1994, a copy of which is annexed hereto as Exhibit "A" and made a part hereof.

5. The Notice of Receipt of Petition evidenced by the United States Tax Court does not reflect Hand Delivery as asserted by Respondent's Counsel on January 6, 1994, a copy of which is annexed hereto as Exhibit "B" and made a part hereof.

6. The Petition was postmarked January 5, 1994, by delivery of the Petition to Federal Express on that date, consistent with instructions by the Deputy Clerk, United States Tax Court as described above.

THEREFORE, the Petitioners meets the requirements in IRC S 6213(a) or S 7502.

WHEREFORE, the Petitioners pray that this Motion to Confirm Jurisdiction by granted.

_____
Richard S. Weissman

_____
Robin Weissman

CERTIFICATE OF SERVICE

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Florida 33351.

This is to further certify that the original of the aforementioned paper was sent Federal Express to the Court on February 4, 1994.

_____
Richard S. Weissman

_____
Robin Weissman

Exhibit "A"

Federal Express Receipt
Dated January 5, 1994

Exhibit "B"

Notice of Receipt of Petition

Exhibit "B"

UNITED STATES TAX COURT
400 SECOND STREET, N.W.
WASHINGTON, D.C. 20217

Richard S. & Robin Weissman
16212 Bridlewood Cir.
Delray Beach, FL 33445-6674

NOTIFICATION OF RECEIPT OF PETITION

Docket No. : 448-94

Name of Case: Richard S. & Robin Weissman

On January 06, 1994 the Court received and filed a PETITION in the above case.

Further:
(X) Filing Fee Paid
----------(X)
Designation of Place of Trial not received

Petition served on respondent on January 06, 1994

All papers and correspondence MUST bear the DOCKET NUMBER given above.

Charles S. Casazza

Clerk of the Court

Date: January 06, 1994

IN THE UNITED STATES TAX COURT
WASHINGTON, D. C. 20217

MICHAEL WEISSMAN and LINDA WEISSMAN,	)	
Petitioners,	)	
vs.	)	**DOCKET NO: 447-94**
COMMISSIONER OF INTERNAL REVENUE	)	
Respondent	)	

ORDER OF DISMISSAL FOR LACK OF JURISDICTION

On February 7, 1994, respondent filed a Motion to Dismiss for Lack of Jurisdiction on the ground the petition was not filed within the time prescribed by the applicable provisions of the Internal Revenue Code. Respondent attached to the motion a copy of the Certified Mail List, as evidence of the fact that the notice of deficiency was sent to petitioners by certified mail on October 7, 1993.

The petitioner was filed with the Court on January 6, 1994, which date is the 91st day after the notice of deficiency was mailed to petitioners. The petition was hand-delivered to the Court. Accordingly, the wrapper in which the petitioner was sent to the Court does not bear a United States postmark.

This Court is a court of limited jurisdiction. It may therefore exercise jurisdiction only to the extent expressly provided by statute. Breman v. Commissioner, 66 T.C. 61, 66(1976). In a case seeking the redeter-

mination of a deficiency, the taxpayer, and on the timely filing of a petition by the taxpayer. Rule 13(c), Tax Court Rules of Practice and Procedure; Brown v. Commissioner, 78 T.C. 215, 220 (1982). In this regard, section 6213(a), Internal Revenue Code, provides that the petition must be filed with the Court within 90 days, or 150 days if the notice is addressed to a person outside the United States, after the notice of deficiency is mailed (not counting Saturday, Sunday, or a legal holiday in the District of Columbia as the last day). The Court has no authority to extend this 90-day (or 150-day) period. Joannou v. Commissioner, 33 T.C. 868, 869(1960). However, if the conditions of section 7502, Internal Revenue Code, are satisfied, a petition which is timely mailed is treated as having been timely filed.

In the present case the 90-day period for filing a petition with this Court expired on Wednesday, January 5, 1994. However, the petition was not filed within that 90-day period.

Petitioners were served with a copy of respondent's Motion to Dismiss for Lack of Jurisdiction and on February 7, 1994, filed an objection. Petitioners contend that the petition was timely mailed and thus timely filed. The record reflects the petition was sent to the Court by Federal Express. The Court has expressly held that the timely-mailing/timely-filing provisions of section 7502, Internal Revenue Code, do not apply where the taxpayer places the petition in the hands of a private air express service (such as Federal Express) for delivery to the Court. Blank v. Commissioner, 76 T.C. 400 (1981). Rather, that section is operative only when delivery is made by the United States Postal Service.

The premises considered, it is

ORDERED that respondent's Motion to Dismiss for Lack of Jurisdiction is granted and this case is dismissed for lack of jurisdiction.

(Signed) L.W. Hamblen, Jr.

Chief Judge

Entered: February 15, 1994

IN THE UNITED STATES TAX COURT
WASHINGTON, D. C. 20217

RICHARD WEISSMAN and ROBIN WEISSMAN,	)	
Petitioners,	)	
vs.	)	**DOCKET NO: 448-94**
COMMISSIONER OF INTERNAL REVENUE	)	
Respondent	)	

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The premises considered, it is

ORDERED that respondent's Motion to Dismiss for Lack of Jurisdiction is granted and this case is dismissed for lack of jurisdiction.

(Signed) L.W. Hamblen, Jr.

Chief Judge

Entered: February 15, 1994

UNITED STATES TAX COURT
400 SECOND STREET, N.W.
WASHINGTON, D.C. 20217

RICHARD S. WEISSMAN	)	
AND	)	
ROBIN WEISSMAN	)	
	)	
Petitioners	)	Docket
	)	No: 448-94
v.	)	
	)	
COMMISSIONER OF INTERNAL REVENUE	)	
	)	
Respondent	)	

NOTICE OF APPEAL

Notice is hereby given that Richard S. Weissman and Robin Weissman, Petitioners hereby appeal to the United States Court of Appeals for the Eleventh Circuit from the decision of this Court entered in the above-captioned proceeding on February 15, 1994 relating to an Order of Dismissal for lack of jurisdiction.

Date: May 3, 1994

Richard S. Weissman
SSN# 146-44-4001
16212 Bridlewood Circle
Delray Beach, FL 33445

Robin Weissman
SSN# 267-11-5702
16212 Bridlewood Circle
Delray Beach, FL 33445

CERTIFICATE OF SERVICE

This is to certify that a copy of the foregoing Notice of Appeal was served on Respondent, by mailing the same on _____ in a postage paid wrapper addressed to Kenneth A. Hochman, Senior Attorney, Internal Revenue Service, T.C.No. HK0097, Atrium West-Suite 240, 7771 W. Oakland Park Boulevard, Sunrise, FL 33351.

This is to further certify that the original of the aforementioned Notice was mailed to the Court on _____.

_____
Richard S. Weissman
SSN #146-44-4001
16212 Bridlewood Circle
Delray Beach, FL 33445

_____
Robin Weissman
SSN #267-11-5702
16212 Bridlewood Circle
Delray Beach, FL 33445

UNITED STATES TAX COURT
400 SECOND STREET, N.W.
WASHINGTON, D.C. 20217

MICHAEL WEISSMAN	)	
AND	)	
LINDA WEISSMAN	)	
	)	
Petitioners	)	Docket
	)	No: 447-94
v.	)	
	)	
COMMISSIONER OF INTERNAL REVENUE	)	
	)	
Respondent	)	

NOTICE OF APPEAL

Notice is hereby given that Michael Weissman and Linda Weissman, Petitioners hereby appeal to the United States Court of Appeals for the Eleventh Circuit from the decision of this Court entered in the above-captioned proceeding on February 15, 1994 relating to an Order of Dismissal for lack of jurisdiction.

Date: May 3, 1994

Michael Weissman
SSN #143-30-8208
6887 Viento Way
Boca Raton, FL 33433

Linda Weissman
SSN #137-34-0348
6887 Viento Way
Boca Raton, FL 33433

CERTIFICATE OF SERVICE

This is to certify that a copy of the foregoing Notice of Appeal was served on Respondent, by mailing the same on _____ in a postage paid wrapper addressed to Kenneth A. Hochman, Senior Attorney, Internal Revenue Service, T.C. No. HK0097, Atrium West-Suite 240, 7771 W. Oakland Park Boulevard, Sunrise, FL 33351.

This is to further certify that the original of the aforementioned Notice was mailed to the Court on _____.

_____
Michael Weissman
SSN:143-30-8208
6887 Viento Way
Boca Raton, FL 33433

_____
Linda Weissman
SSN:137-34-0348
6887 Viento Way
Boca Raton, FL 33433

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 94-4538

MICHAEL WEISSMAN and
LINDA WEISSMAN,

Petitioners-Appellants,

versus

COMMISSIONER OF INTERNAL
REVENUE,

Respondent-Appellee.

No. 94-4542

RICHARD S. WEISSMAN and
ROBIN WEISSMAN,

Petitioners-Appellants,

versus

COMMISSIONER OF INTERNAL
REVENUE,

Respondent-Appellee.

On Appeal from Decisions of the
United States Tax Court

O R D E R:

Appellants' motion to consolidate appeals is granted.

Signed: Phyllis Kravitch
UNITED STATES CIRCUIT JUDGE

[Filed: September 26, 1994]

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 94-4538
Non-Argument Calendar

Tax Court No. 447-94

MICHAEL WEISSMAN and
LINDA WEISSMAN,

Petitioners-Appellants,

versus

COMMISSIONER OF INTERNAL
REVENUE,

Respondent-Appellee.

No. 94-4542
Non-Argument Calendar

Tax Court No. 448-94

RICHARD S. WEISSMAN and
ROBIN WEISSMAN,

Petitioners-Appellants,

versus

COMMISSIONER OF INTERNAL
REVENUE,

Respondent-Appellee.

Appeals from a Decision of the
United States Tax Court

(June 30, 1995)

Before ANDERSON, BLACK and CARNES, Circuit Judges.

PER CURIAM:

On October 7, 1993, notices of tax deficiencies were mailed to Appellants. On January 5, 1994, Appellants submitted Petitions for Review to the United States Tax Court by placing the Petitions with Federal Express, a private mail service. The Petitions were received by the Tax Court on January 6, 1994. On February 15, 1994, the Petitions were dismissed by the Tax Court for lack of jurisdiction because the Petitions were untimely filed. Appellants appeal the dismissal arguing that, in section 7502 of the Internal Revenue Code, Congress intended "to authorize postmarks by private mail services as a basis to file in the Tax Court" and that, therefore, timely placing the Petitions with Federal Express for delivery is the equivalent of timely filing the Petitions.

Section 6213(a) of the Internal Revenue Code permits a taxpayer to file a petition for redetermination of a deficiency within 90 days after the notice of a deficiency is mailed, and timely filing of the petition is a jurisdictional prerequisite for a suit in the Tax court. Pugsley v. Commissioner of Internal Revenue, 749 F.2d 691, 692 (11th Cir. 1985)(citing Rich v. Commissioner, 250 F.2d 170, 175 (5th Cir. 1957)). "Section 7502 of the Internal Revenue Code provides that timely mailing of a document through the United States mails may be equivalent to timely filing of the document." Id. at 693. "It is apparent from the numerous references to 'United States mail' in the statute and regulations that section 7502 is intended to apply only to mail delivered by the United States Postal Service and not also to items delivered by a private delivery service." Id. (citing Blank v. Commissioner, 76 T.C. 400

(1981)). [S]eciton 7502 does not apply when delivery of petitions is made by a private delivery service rather than the U.S. Postal Service." Id. at 693-94. The Pugsley court acknowledged that the appellants' arguments might have some merit[1] but suggested that the arguments "should be addressed to Congress and not to the courts." Id. at 693.

The Tax Court did not err in dismissing the Petitions for lack of jurisdiction.

AFFIRMED.

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[1]The appellants in Pugsley argued, as do Appellants here, that it was inequitable to deny them the protection of section 7502 when "private delivery services are usually quicker than the U.S. Postal Service in delivering documents" and "the dated receipts given by the private delivery services insure a minimal possibility of backdating documents to avoid a filing deadline." Id. at 693.

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 94-4538

Tax Court No. 447-94

MICHAEL WEISSMAN and
LINDA WEISSMAN,

Petitioners-Appellants,

versus

COMMISSIONER OF INTERNAL
REVENUE,

Respondent-Appellee.

No. 94-4542

Tax Court No. 448-94

RICHARD S. WEISSMAN and
ROBIN WEISSMAN,

Petitioners-Appellants,

versus

COMMISSIONER OF INTERNAL
REVENUE,

Respondent-Appellee.

Appeals from a Decision of the
United States Tax Court

ON PETITIONER(S) FOR REHEARING AND SUGGESTION(S) OF REHEARING EN BANC
(Opinion_____, 11th cir., 19__, ____F.2d_____)

Before: ANDERSON, BLACK and CARNES, Circuit Judges.

PER CURIAM:

The Petition(s) for Rehearing are DENIED and no member of this panel nor other Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the suggestion(s) of Rehearing En Banc are DENIED.

ENTERED FOR THE COURT:

Signed: Susan H. Black
UNITED STATES CIRCUIT JUDGE

ORD-42

[Filed: September 25, 1995]

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 94-4538

MICHAEL WEISSMAN and
LINDA WEISSMAN,

Petitioners-Appellants,

versus

COMMISSIONER OF INTERNAL
REVENUE,

Respondent-Appellee.

No. 94-4542

RICHARD S. WEISSMAN and
ROBIN WEISSMAN,

Petitioners-Appellants,

versus

COMMISSIONER OF INTERNAL
REVENUE,

Respondent-Appellee.

On Appeal from Decisions of the
United States Tax Court

O R D E R:

Appellants' motion to recall this court's mandate is GRANTED. The clerk is directed to reissue the mandate if the clerk does not actually receive Appellants' motion to stay this court's mandate pending the filing of a petition for certiorari within 10 days of this

order.

Signed: Susan H. Black
UNITED STATES CIRCUIT JUDGE

[Filed: October 30, 1995]

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 94-4538

MICHAEL WEISSMAN and
LINDA WEISSMAN,

Petitioners-Appellants,

versus

COMMISSIONER OF INTERNAL
REVENUE,

Respondent-Appellee.

No. 94-4542

RICHARD S. WEISSMAN and
ROBIN WEISSMAN,

Petitioners-Appellants,

versus

COMMISSIONER OF INTERNAL
REVENUE,

Respondent-Appellee.

On Appeal from Decisions of the
United States Tax Court

O R D E R:

Appellants' motion to stay this court's mandate pending resolution of their petition for certiorari is granted.

Signed: Susan H. Black
UNITED STATES CIRCUIT JUDGE

[Filed: December 6, 1995]